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No. 00-838

In The

Supreme Court of the United States

SOUTH FORK BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA; MARVIN MCDADE, in his capacity as Chairman of the South Fork Band Council,

Petitioners,

v.

SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,

Respondents.

and

STATE ENGINEER of the State of Nevada and WATER COMMISSIONERS of the Sixth Judicial District Court,

Real Parties In Interest.

On Petition For Writ Of Certiorari To The Nevada Supreme Court

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. STATE APPELLATE COURT DENIALS OF APPLICATIONS FOR WRITS OF PROHIBITION ARE FINAL FOR PURPOSES OF REVIEW BY THE UNITED STATES SUPREME COURT.

The Tribe[1] seeks this Court's review of the Nevada Supreme Court's denial of its application for a Writ of Prohibition seeking to enjoin the lower state court from proceeding in excess of its jurisdiction asserting the Tribe's federal common law immunity from suit. The Respondents argue that the decision of the Nevada Supreme Court is a "preliminary decision" and should not be reviewed by this Court. (Opp. p., 9). This Court has jurisdiction over final decisions of a state court pursuant to 28 U.S.C. § 1257. Denials of writs of prohibition are final and reviewable even though the underlying litigation continues when the denial is conclusive on the issue put forward in the writ. As noted by a distinguished commentator on Supreme Court practice,

> The principles heretofore discussed apply with equal force to civil proceedings in prohibition, mandamus, *quo warranto*, and for writ of error *coram nobis*. Applications for such writs are often filed in state courts as independent cases, even though they relate to a pending lawsuit. Such proceedings may be carried forward to conclusion before the primary litigation has come to an end. To be final for purposes of

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[1] "Tribe" refers to the Petitioners, the South Fork Band of the Te-Moak Tribe of the Western Shoshone Indians, *see* Petition p. 1.

> § 1257, the state court judgment must conclusively determine the right of the applicant to the writ sought. . . . Instances where the Court has accepted § 1257 jurisdiction over state court judgments finally disposing of applications for writs of prohibition include *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954); *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-68 (1947); *Bandini Co. v. Superior Court*, 284 U.S. 8, 14-15 (1931)[2]

Moreover, this Court has accepted review when state courts have decided federal issues conclusively, *see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In this case the Respondents concede that, "The Nevada Supreme Court may have ruled on an important federal issue, i.e. tribal sovereign immunity, . . . " (Opp. p. 9). That it ruled conclusively on the important federal issue of tribal sovereign immunity is clear.

In this case, the lower state court conducted a contempt proceeding against the Respondent after the Writ of Prohibition was denied. A decision was rendered by the lower court finding the Tribe and its Chairman in contempt and imposed prospective penalties for any future contemptuous conduct. The Tribe has appealed that decision to the Nevada Supreme Court on issues unrelated to the issue of the sovereign immunity of the Tribe. Even if the Tribe were successful on appealing the merits of the contempt claims and the appropriateness of the penalties prospectively imposed, the issue of whether

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[2] Supreme Court Practice, 7 Ed., Robert L. Stern [*et al.*], The Bureau of National Affairs, Inc. (1993), p. 108.

or not the Tribe is immune from suit in the first instance would not be resolved. If this Court denied Certiorari at this time and if the Tribe was unsuccessful on the merits, then the Tribe would once again have to file a Writ with this Court. Such a process is not judicially economical. Consequently, the decision of the Nevada Supreme Court on the federal common law question of tribal sovereign immunity is a final judgment and is reviewable by this Court at this time.

This Court has previously enunciated its role as final arbiter of federal Indian law issues even in water rights adjudication cases, *see Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3201 (1983). Even though in that case, this Court ruled that state water right adjudication cases could be heard in state court against the United States, this Court still recognized the importance of Tribal sovereign immunity by stating,

> Nothing we say today should be understood to represent even the slightest retreat from the general proposition we expressed so recently in *New Mexico v. Mescalero Apache Tribe*, 462 U.S., at 332: 'Because of their sovereign status, [Indian] tries and their reservation lands are insulated in some respects by a 'historic immunity from state and local control,' *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973), and tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.' *Washington v. Confederated Tribes*, 447 U.S. 134, 153 (1980).
>
> 463 U.S. 545, 570-571.

This Court announced its intention to review state court decisions involving allegations for failure to follow federal law when it stated,

> We also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment. (Emphasis in the original).

463 U.S. 545, 571.

II. THE TRIBE DID NOT EXECUTE DEEDS CONSENTING TO STATE COURT JURISDICTION.

The gravamen of the Tribe's argument is that a tribe's waiver of immunity from suit must be unequivocally expressed and cannot be waived by implication. The Respondent argues for the first time that not only does the United States' acquisition of state created water rights acts as such a waiver but that the Tribe itself executed deeds thereby acquiescing to state court jurisdiction. (Opp. pp. 16-19). In support of that argument, the Respondent asserts that,

> As evidenced by the deeds of conveyance, the United States and the Tribe expressly, intentionally and voluntarily acquired land water

> rights, and encumbrances, one being the respondent court's jurisdiction.
>
> (Opp. p. 16).

And that,

> The United's and the Tribe's execution of these deeds divested the Tribe's immunity . . .
>
> (Opp. p. 17)

The Respondent's assertion that the Tribe executed deeds encumbered by state water law is without support in the record. The deeds in questions were executed only by the United States through various purchases of private ranches from May 1937 through November 1938. (Writ, p. 3). The Respondents cannot point to the existence of a deed executed by the Tribe. Indeed, the Tribe itself did not exist as an entity until 1941[3]. It is inconceivable that a Tribe could be found to have expressly waived its immunity from suit by purchases of land by the United States before it even existed as a formal tribal entity.

Assuming for the purposes of argument that the Tribe executed the deeds, the Respondents assertion that the Tribe thereby expressly granted an easement across the reservation by executing deeds burdened with the

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[3] The peoples that are members of the Tribe are descended from indigenous peoples who ultimately were identified as the Te-Moak Tribe of Western Shoshone Indians. That Tribe was federally recognized in August 24, 1938. Individuals relocated to the lands purchased by the United States when a reservation was created from those lands in 1941. From then on, those peoples who resided on that reservation, were identified as members of the South Fork Band of the Te-Moak Tribe of Western Shoshone Indians.

obligations of the Humboldt Decree (Opp. p. 25) is untenable. This argument is inconsistent with Respondents assertion that the Humboldt Decree does not specifically burden the property owner with easement across their property but rather that it is, "**implicit** in this injunction as a necessary power water commissioners have to travel . . . " (Emphasis added). (Opp. p. 26). Essentially, the Respondents argument is that the Tribe has explicitly granted an easement by executing deeds, which they have not, that are burdened only with an implicit right to travel. Essentially, the Respondents urge an express waiver upon an implication based upon an implication.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE ISSUES PRESENT ARE LIKELY TO RECUR.

Respondents urge that the Writ should be denied because the United States has admitted the factual situation would not be "oft repeated" (Opp. p. 10)[4]. In the

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[4] The proceeding before the Nevada Supreme Court was a pure legal challenge to the lower court's assertion of jurisdiction over an Indian tribe when its immunity from suit had not been waived. At the time of the filing of the Writ of Prohibition, no factual hearing had taken place before the lower court. Even though the Respondents complain that the Petitioner made, "a number of factual assertions that were not litigated in the lower court . . . " (Opp. p.) the Respondents' brief is replete with factual allegations that were not litigated as part of this appeal. (Opp. pp. 5-7). Moreover, some of these assertions are contradicted. The Respondents assert that for three full irrigation seasons, the Tribe prohibited the state from regulating its water rights (Opp. p. 30) yet the Respondents note that they obtained a preliminary injunction in September 1999 prohibiting the Tribe from barring access to head gates on the

United States' Petition for Writ Of Certiorari in *Department of Interior v. South Dakota*, 519 U.S. 919, 117 S.Ct. 286, 136 L.Ed.2d 205 (1996), the Solicitor General of the United States brought to the Court's attention the significant amount of land being put in trust for Indian tribes. The Solicitor stated in his brief,

> The decision below has great practical significance to the Secretary's day-to-day administration of the IRA. We have been informed by the Department of the Interior that there are 439 pending applications to the Secretary to take land in trust. The court of appeals' ruling calls into question the Secretary's authority to do so.

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reservation (Opp. p. 5), which the tribe has complied with by enacting a resolution authorizing access onto the reservation. The Respondents note that the lower court held a contempt hearing (Opp. p. 7) but do not inform this Court that the Tribe in open court and by subsequent resolution authorized access across the reservation pending this appeal.

Respondents assert that part of the Tribe's water rights is served by diversions located on the Gund Ranch which can only be reached via a road crossing the reservation. (Opp. p. 5). Yet, Respondents admit that they flew over the reservation. (Opp. p. 6).

The Respondents describe Humboldt II as the Respondents effort to compel the United States to pay the Tribe's water assessment fees (Opp. p. 4) but do not inform this Court that the United States has paid the fees that were the subject of Humboldt II.

> In addition, the decision below calls into question thousands of acquisitions (covering an estimated 9 million acres) that the Secretary has made under Section 5 during the past 60 years. Challenges to such acquisitions might be raised in a broad range of cases in which the trust status of land may be relevant, including those concerning state and tribal taxation, land-use regulations, and law enforcement jurisdiction. See, *e.g.*, *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (state taxation of non-trust lands); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning of non-Indian lands); 18 U.S.C. 1151 *et seq.* (federal prosecution of offenses occurring in "Indian country"). (Footnote omitted).
>
> App. at A-2.

The United States highlights many situations wherein the applicability of state laws and state court jurisdiction on lands purchased by the United States for Indian tribes is called into question. While not all of the 9 million acres referred to involve water law matters, it is conceivable that a sizeable percentage of these lands hold appurtenant water rights and the questions of state court jurisdiction could, therefore, arise elsewhere.

CONCLUSION

For the reasons set forth in Petitioners' Brief, the Tribe requests that its Petition for a Writ of Certiorari be granted.

Respectfully Submitted

RAYMOND RODRIGUEZ, ESQ.
Council for Petitioners

APPENDIX A

App. 1

No.

In The Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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* * *

The decision below has great practical significance to the Secretary's day-to-day administration of the I.R.A. We have been informed by the Department of the Interior that there are 439 pending applications to the Secretary to take land in trust. The court of appeals' ruling calls into question the Secretary's authority to do so. In addition, the decision below calls into question thousands of acquisitions (covering an estimated 9 million acres) that the Secretary has made under Section 5 during the past 60 years. Challenges to such acquisitions might be raised in a broad range of cases in which the trust status of land may be relevant, including those concerning state and tribal taxation, land-use regulation, and law enforcement jurisdiction. See, *e.g.*, *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (state taxation of non-trust lands); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning of non-Indian lands); 18 U.S.C. 1151 *et seq.* (federal prosecution of offenses occurring in "Indian country").[7]

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[7] We do not concede, of course, that collateral attacks on the United States' trust title to land should be entertained in the sorts of cases cited in the text, but the prospect of the numerous attempts to do so exacerbates the uncertainty occasioned by the court of appeals' constitutional ruling.